No. 16-1435

In The
Supreme Court of the United States

Minnesota Voters Alliance et al., *Petitioners*

v.

Joe Mansky et al., *Respondents*

On Writ of Certiorari to the
U.S. Court of Appeals for the Eighth Circuit

Brief of Amicus Curiae James Madison Center for Free Speech, Inc. Supporting Petitioners

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Questions Presented

Is Minnesota Statute Section 211B.11, which bans all political apparel at the polling place, facially overbroad under the First Amendment?

Amicus focuses on the included issue of whether this Court's "express words of advocacy" test, *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976)—including the First Amendment doctrines underpinning it such as required "precision of regulation" and rejection of "intent and ... effect" tests, *id.* at 41, 43—should be applied to cure the imprecision and overbreadth here.

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Interest of Amicus Curiae[1]

The purpose of the James Madison Center for Free Speech is to support litigation and public education activities defending rights of political expression and association. The Madison Center is an internal educational fund of James Madison Center, Inc., a District of Columbia non-profit corporation. Madison Center is tax-exempt under 26 U.S.C. 501(c)(3). Counsel for Amicus have authored articles, testimony, and comments and litigated numerous cases involving campaign-finance and free-speech issues. James Bopp, Jr. is Madison Center's general counsel. Cases in which he was counsel in this Court include *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), *FEC v. Beaumont*, 539 U.S. 146 (2003), *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006), *Randall v. Sorrell*, 548 U.S. 230 (2006), *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), *Citizens United v. FEC*, 558 U.S. 310 (2010), *American Tradition Partnership v. Bullock*, 567 U.S. 516 (2012), and *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014).

Summary of the Argument

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court established the express-advocacy test to cure imprecision and overbreadth. *Buckley* emphasized that the First Amendment imposes its own requirement of special "precision of regulation," apart from due-process concerns with notice and fair enforcement, to prevent

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[1] Rule 37 statement: All parties filed blanket consents; no counsel for any party authored this brief in whole or in part; and no person or entity other than amicus or its counsel funded its preparation or submission.

chilling protected speech, including especially issue advocacy. Failure to precisely define the scope of regulation resulted in the overbreadth resulting from lack of narrow tailoring, including sweeping in issue advocacy. In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), this Court confirmed that the express-advocacy constructions that *Buckley* did largely under the label of fixing "vagueness" were also in fact done to prevent "overbreadth" by lack of narrow tailoring, including sweeping in protected issue advocacy, and then *MCFL* employed the express-advocacy construction too. As part of requiring "precision of regulation," *Buckley* expressly rejected intent-and-effect tests, as would be affirmed in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL-II*"). And *Buckley* also rejected regulation of mere "political" speech by refocusing a disclosure provision to reach "campaign-related" activity before imposing both the major-purpose test and the express-advocacy test to assure that the disclosure provision was not overbroad, did not sweep in issue advocacy and issue-advocacy groups, and reached only activity that is "unambiguously campaign related." *See* Part I.

In *Burson v. Freeman*, 504 U.S. 191 (1992), this Court upheld a case similar to the present one that involved "campaign materials" and "solicitation," both of which would have been understood in light of *Buckley*. So *Burson* provides no authority for upholding the present restriction of "political" items. *See* Part II.

In *McConnell v. FEC*, 540 U.S. 93 (2003), this Court said *Buckley* (and consequently *MCFL* too) used the express-advocacy simply as a saving construction to avoid vagueness and overbreadth, and not as a constitutional mandate to specially protect issue advocacy.

But it left intact the ability of courts to use the express-advocacy construction to save imprecise and overbroad statutes that are amenable to such a construction. *See* Part III.

After *McConnell*, federal circuit courts recognized that *McConnell* left intact the ability to use the express-advocacy construction to save imprecise and overbroad provisions, finding some provisions amenable to such construction and others not. *See* Part IV.

The foregoing doctrines prove that the provision at issue, restricting "political" items in polling buffer-zones, is unconstitutionally imprecise and overbroad, but not amendable to the saving express-advocacy construction. A Policy issued to explain what "political" means in the challenged provision actually exacerbates the imprecision and overbreadth of the challenged provision. And a proffered construction in Respondents brief opposing a grant of certiorari is grammatically and logically erroneous, in addition to introducing further imprecision and overbreadth. In sum, the challenged provision cannot be saved and should be held in violation of the First Amendment. *See* Part V.

Argument

I.

Buckley Established the Express-Advocacy Test to Cure Imprecision and Overbreadth.

In *Buckley*, 424 U.S. 1, this Court addressed similar constitutional problems and affirmed three controlling First Amendment doctrines: (A) regulation of campaign-related speech requires precise language to avoid chilling protected speech, especially issue advocacy; (B) intent-and-effects tests fail required precision; and (C)

the express-advocacy construction cures imprecision and overbreadth and limits regulation to campaign-related speech.

A. This Court Requires "Precision of Regulation," Including Special Protection Against Chilling Issue Advocacy.

In considering a vagueness challenge to a $1000 limit on expenditures "'relative to a clearly identified candidate,'" *Buckley*, 421 U.S. at 39 (quoting 18 U.S.C. § 608(e)(1) (1970)), this Court reaffirmed the necessity of "precision": "The test is whether the language of § 608(e)(1) affords the '[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms,'" 424 U.S. at 41 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). This Court held that the im-"precision" or "vagueness problem was threefold:

> In such circumstances [involving speech restriction], vague laws may not only [i] trap the innocent by not providing fair warning or [ii] foster arbitrary and discriminatory application but also [iii] operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.

Id. at 41 n.48 (quotation marks and citations omitted).

The first two identified vagueness problems—(i) lack of notice and (ii) unfair enforcement—involve due-process protections. The third imprecision problem—(iii) the lack of precise definition and narrow tailoring that results in chilling protected speech—is uniquely protected against by the First Amendment: "'Because First Amendment freedoms need breathing

space to survive, government may regulate in the area only with narrow specificity.'" *Id.* at 41 n.48 (quoting *NAACP*, 371 U.S. at 433). And, *Buckley* held, First Amendment protection requires distinguishing protected issue advocacy from regulable express advocacy:

> [T]he distinction between *discussion of issues and candidates* and *advocacy of election or defeat of candidates* may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42 (emphasis added). Such a distinction, with protection clearly provided to issue advocacy by a bright-line test, is essential to "eliminate[] the problem of unconstitutional vagueness altogether." *Id.*

Because a construction of "'relative to' a candidate to ... mean 'advocating the election or defeat of' a candidate," did not solve this "distinction" problem, this Court rejected that construction as insufficient. *Id.* Rather, to establish the necessary "clear-cut distinction between discussion, laudation, general advocacy," on the one hand, versus "solicitation," on the other hand, *id.* at 43, this Court construed "§ 608(e)(1) ... to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," *id.* at 44, which it called an "express words of advocacy" test:

> This construction would restrict the application of § 608(e)(1) to communications containing ex-

> press words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

Id. at 44 n.52.

Buckley applied the same express-advocacy construction, *id.* at 80, to a provision requiring disclosure of disbursements "'for the purpose of ... influencing' the nomination or election of candidates for federal office,'" *id.* at 74-75 (citation omitted), "[t]o insure that the reach of § 434(e) is *not impermissibly broad*," *id.* at 80 (emphasis added). And this Court applied the major-purpose test to assure that the disclosure provision would not "reach groups engaged purely in issue discussion" because "for the purpose of ... influencing' had "the same potential for encompassing both issue discussion and advocacy of a political result. *Id.* at 79. Here, *Buckley* makes clear that the problem at issue is not just vagueness, but also overbreadth, both resulting from the unconstitutional imprecision and lack of narrow tailoring.

From the foregoing it is clear that *Buckley* imposed a high standard for the "precision" (or "narrow specificity" or non-"vagueness") required in this area, both to prevent due-process concerns about notice and fair enforcement and to prevent overbreadth (lack of narrow tailoring) in provisions sweeping in issue advocacy while purporting to regulate "campaign" speech (*see* Part I.C regarding "campaign speech"). And it is also clear that though *Buckley* sometimes framed its analysis in terms of "vagueness," *id.* at 42—i.e., lack of "precision" or "narrow specificity," *id.* at 41 & n.48—that

"vagueness" concern also encompassed the *overbreadth* problem of sweeping in protected issue advocacy.[2]

That *Buckley* was dealing with the *overbreadth* of imprecise definition and tailoring, including sweeping in issue advocacy, is also clear from *MCFL*, 479 U.S. 238. *MCFL* applied the express-advocacy construction to a ban on corporate and union "expenditures *in connection with* any [federal] election." *Id.* at 248-49. *MCFL* said *Buckley* applied the express-advocacy test "to avoid problems of overbreadth," *id.* at 248, and "[t]he rationale for this holding was [that] '[the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application,'" *id.* at 249 (quoting *Buckley*, 421 U.S. at 42).

It is vital to note here that this *Buckley-MCFL* "overbreadth" sprang from imprecise definition and tailoring, including sweeping in issue advocacy, and did not turn on the substantial-overbreadth formula for

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[2] The Question Presented uses "overbroad" (Petrs.' Br. i), but as discussed above, *Buckley* makes overbreadth part of the im-"precision" *Buckley* called "vagueness," so "vagueness" or "imprecision" claims are proper here (*see, e.g.*, Petrs.' Br. 35, 46 n.17 (vagueness claims)), despite Respondents' assertion that Petitioners make no vagueness challenges (Opp'n 26 n.7). Anyway, because a First Amendment challenge has been made, and the First Amendment has its own "precision" or non-vagueness requirement, Petitioners may make any First Amendment argument they wish, including vagueness arguments. *See Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010) ("'[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" (citations omitted)).

the type of First Amendment "overbreadth" described, e.g., in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), that essentially allows third-party standing. So there are two types of "overbreadth." They may fairly be described as "*Buckley*-overbreadth" and "*Broadrick*-overbreadth." Under *Buckley* and *MCFL*, the former is a result of imprecise definition and lack of tailoring that sweeps in issue advocacy and does not depend on *Broadrick*'s substantial-overbreadth formula. As applied here, restricting "political" items is overbroad because it fails *Buckley*'s precision mandate—both because "political" fails the due-process requirements of ensuring notice and fair enforcement and because it is not narrowly tailored, including for sweeping in issue advocacy, so that protected speech is chilled. Because it is overbroad under *Buckley*-overbreadth, arguments about "legitimate sweep" and substantiality of overbreadth are beside the point. That analysis belongs to *Broadrick*-overbreadth analysis.[3]

Because *Buckley*'s use of "vagueness" sprang from both due-process concerns (lack of notice and fair enforcement) and the imprecise-tailoring overbreadth of sweeping in issue advocacy, the term "imprecision" is used herein to describe *Buckley*'s "vagueness" concern (and that of *MCFL*). "Precision" is required in this most protected of First Amendment contexts, as *Buckley* reaffirmed, 421 U.S. at 41, and the term "imprecision" encompasses both reasons why that is so.

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[3] The challenged provision would also fail *Broadrick*-overbreadth because the sweep of "political" is vast, reaching far beyond speech that might be regulable under any cognizable supporting interest.

B. This Court Rejects "Intent and Effect" Speech Tests.

In describing the required "precision" and the problem of distinguishing express advocacy from issue advocacy absent the express-advocacy test, *Buckley* expressly rejected "'intent and ... effect'" tests because they "'put[] the speaker ... wholly at the mercy of the ... varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.'" 424 U.S. at 43 (citation omitted).

This rejection of intent-and-effect tests was reaffirmed in *WRTL-II*, 551 U.S. at 465-69 (2007) (plurality opinion[4]), which noted (inter alia) that "*Buckley* had already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates," *id.* at 467. Moreover, *WRTL-II* noted, *McConnell*[, 540 U.S. 93),] did not purport to overrule *Buckley* on this point—or even address what *Buckley* had to say on the subject." 551 U.S. at 467.

As discussed in Part V, no intent-and-effect test or construction is permissible in this case.

C. *Buckley*'s Express-Advocacy Test Also Restricts Regulation to "Campaign" Activity.

Early in the *Buckley* opinion, this Court recognized that "[t]he constitutional power of Congress to regulate federal elections" is based on "Article I, § 4, of the Constitution[, which] grants Congress the power to regulate elections of members of the Senate and House of Representatives." 421 U.S. at 13 & n.16. Consequently, all regulated activity in the "Federal Election Cam-

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[4] This controlling opinion states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977).

paign Act ... and related provisions of the Internal Revenue Code," *id.* at 6, had to be closely and clearly related to regulating elections. So the *Buckley* Court took great care to assure such close relation at several pertinent points. Three are discussed here.

First, this Court imposed the express advocacy construction on "relative to a ... candidate" in an expenditure limitation to distinguish expenditures for issue advocacy from "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44. *See* Part I.A. The express-advocacy test not only solved the imprecision and overbreadth problems discussed above, it also confined Congress to its authority to regulate only campaign-related activity.

Second, this Court emphasized that it was restricting Congress to its authority when construing "the phrase, 'for the purpose of ... influencing' an election or nomination, [which] ... shares the same potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79. This Court actually did two constructions, regarding this purpose-of-influencing phrase. The first had to do with the disclosure requirements of "political committees," which this court narrowed with the major-purpose test to groups that were "campaign related" as follows:

> "political committee" ... could be interpreted to reach *groups engaged purely in issue discussion.* The lower courts have construed the words "political committee" more narrowly. [footnote omitted] To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candi-

> date. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, *campaign related.*

Id. at 79 (emphasis added).

Third, this Court then applied the express-advocacy construction to the purpose-of-influencing phrase for other entities to assure that it reached only "spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 81. The Court first noted a Senate Report that said the provision's goal was "'total disclosure' by reaching 'every kind of *political* activity.'" *Id.* at 76 (citations omitted) (emphasis added). Because regulating all "political activity" is obviously overbroad, *Buckley* first narrowed the goal by saying that Congress really sought to regulate just "political *campaign* financing" and *"campaign*-oriented spending." *Id.* at 77 (emphasis added). And as that remained imprecise and overbroad, this Court then imposed the express-advocacy test:

> But when the maker of the expenditure is ... an individual other than a candidate or a group other than a "political committee" [,] *the relation of the information sought to the purposes of the Act may be too remote.* To insure that the reach of § 434(e) is *not impermissibly broad,* we construe "expenditure" for purposes of that section in the same way we construed the terms of § 608(e) to reach only funds used for communications that expressly advocate [footnote omitted] the election or defeat of a clearly identified candidate. This reading is directed precisely to

> that spending that is *unambiguously related to the campaign of a particular federal candidate.*

Id. at 79-80 (emphasis added). This Court reiterated that, as construed, the purpose-of-influencing phrase and disclosure provision "shed the light of publicity on spending that is *unambiguously campaign related.*" *Id.* at 81 (emphasis added).

As discussed in Part V, *Buckley*'s rejection of the phrase "political activity" as an imprecise and overbroad definition for regulating speech and election-related activity means that the "political" definition at issue here must fail.

II.
Burson Involved "Campaign Materials" and "Solicitation," Not "Political" Materials and "Issue" Advocacy.

Buckley's focus on restricting election-related laws to those that are "unambiguously *campaign* related" in the expenditure-restriction, political-committee-definition, and disclosure contexts, *see* Part I.C, gives meaning to the later use of the term "campaign" in *Burson*, 504 U.S. 191. *Burson* noted that Tennessee "prohibits the solicitation of votes and the display of campaign materials within 100 feet of the entrance of a polling place," which *Burson* called a "campaign-free zone." *Id.* at 193 (plurality[5]). The statute barred "'campaign materials[] and solicitation of votes,'" including for ballot issues. *Id.* at 193-94 (citation omitted). *See also id.* at 223 (Stevens, J., joined by O'Connor and Souter, JJ., dissenting) ("Within the zone, [the challenged ban] si-

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[5] This controlling opinion states the holding. *Marks*, 430 U.S. at 193.

lences all campaign-related expression, but allows expression on any other subject: religious, artistic, commercial speech, even political debate and solicitation concerns issues or candidates not on the day's ballot.") And in *Burson*, the term "campaign" would have been understood by this Court in light of this Court's "campaign" references in *Buckley*, given that they involve the same election-law context. So *Burson* approved removal of unambiguously-*campaign*-related activity from a polling area on election day—nothing more.

Burson provides no authority for banning anything beyond activities that are unambiguously campaign related, such as express-advocacy communications and candidate-committee campaign materials. Specifically, *Burson* provides no support for banning "political" materials and issue advocacy, which are at issue here.

III.
McConnell Left the Express-Advocacy Test Intact for Eliminating Imprecision and Overbreadth.

McConnell discussed *Buckley*'s express-advocacy constructions as needed "to avoid problems of vagueness and overbreadth," 540 U.S. at 192, and it said "we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line," *id.* That left intact the express-advocacy construction as this Court's cure for imprecision and overbreadth in the election-law context.

McConnell returned to the no-vagueness theme at the end of its discussion of the electioneering-communication definition, highlighting the required precision:

> Finally we observe that the new ... definition of "electioneering communication" raises none of

> the vagueness concerns that drove our analysis in *Buckley*.[6] The term ... applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are easily understood and objectively determinable. Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here.

Id. at 194. For present purposes, *McConnell* left intact (indeed recognized) the express-advocacy construction as this Court's saving construction for imprecise and overbroad election-law provisions. In keeping with

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[6] *McConnell*'s statement that *Buckley*'s constructions were a result of "vagueness" alone overlooks its own recitation of the express-advocacy test as being used "to avoid problems of vagueness *and overbreadth*," *id.* at 192 (emphasis added) as well as (i) *Buckley*'s emphasis on avoiding an overbroad sweep that captures issue advocacy, (ii) *Buckley*'s limitation of regulation to unambiguously-campaign-related activity, and (iii) *MCFL*'s statement that *Buckley*'s express-advocacy constructions were to eliminate "overbreadth." *See supra* Part I. Numerous lower courts, including every circuit court to consider the issue, understood *Buckley*'s and *MCFL*'s express-advocacy constructions as including a substantive First Amendment mandate to avoid chilling issue advocacy. *See* James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Still Not a Loophole: Examining* McConnell*'s Exception to* Buckley*'s General Rule Protecting Issue Advocacy*, 31 N. Ky. L. Rev. 289, 295 n.36 (2004) (collecting cases).

Buckley, *MCFL*, and *McConnell*,[7] Part V will address possible applications of that construction.

IV.

Post-*McConnell*, Circuit Courts Use the Express-Advocacy Test to Cure Imprecision and Overbreadth.

After *McConnell*, three circuit courts have recognized that *McConnell* left intact the ability of courts to use the express-advocacy construction to cure provisions that are imprecise and overbroad.

First, the Sixth Circuit led the way in *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004). *Anderson* has special relevance here because it addressed "whether Kentucky's restriction of electioneering within 500 feet of polling places ... is unconstitutionally overbroad." *Id.* at 656 (capitalization altered). Both the "500-foot buffer zone" and "the definition of electioneering" were challenged as "overbroad," the latter for "includ[ing] political speech that does not expressly advocate the election or defeat of candidates for public office." *Id.* at 656.

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[7] *McConnell*'s emphasis on the need for the sort of non-vagueness found n the "electioneering communication" definition in itself dooms the less-precise "political" definition here. Moreover, *WRTL-II* created an "appeal to vote" test to define the "functional equivalent of express advocacy," 551 U.S. at 469-70 (controlling opinion) ("[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."), that is more precise than "political," though that "appeal to vote" test no longer functions after the underlying provision was held unconstitutional in *Citizens United*, 558 U.S. at365-66.

The Sixth Circuit first noted that the seminal *Buckley* decision, as explained by *McConnell*, established "the difference between express advocacy and issue advocacy." *Id.* at 663. The Sixth Circuit cited *McConnell* for the fact that—in considering "the vague requirement of being "relative to a clearly identified candidate'"—"the Court was confronted with a substantial statutory vagueness and overbreadth issue." *Id.* (citation omitted). The Sixth Circuit highlighted the fact that the construction was to avoid the overbreadth of sweeping in issue advocacy with a bright-line test:

> If the Court did not circumscribe the term "relative to," the regulation could apply to broad categories of issue-related speech, which may or may not have any relation to the election or defeat of specific candidates. *In order to avoid overbreadth*, the Court utilized a bright-line rule, and found that "relative to" referred only to expenditures using terms of express advocacy .... By offering a narrowing construction, the Supreme Court interpreted the statute to avoid more protected speech than is necessary to prevent corruption.

Id. at 663-64 (emphasis added; citations omitted).

The Sixth Circuit noted that *McConnell* said that the electioneering-communication definition was not vague so "the Court found that the express advocacy distinction was not necessary," and that the express-advocacy and issue-advocacy distinction was "functionally meaningless,'" and it noted that "the *McConnell* court disavowed the theory that "'the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy.'" *Id.* (citations omitted). But, the

Sixth Circuit continued, the express-advocacy test remains a vital tool to avoid vagueness and overbreadth:

> [*McConnell*] nonetheless left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest. And *McConnell* in no way alters the basic principle that the government may not regulate a broader class of speech than is necessary to achieve its significant interest.

Id. at 664-64. The court noted that Kentucky's "vague" statute, which swept in "'the displaying of signs, the distribution of campaign literature, cards, or handbills," could be interpreted as limited to express advocacy," but

> the Kentucky State Board of Elections has chosen a broader—indeed an overbroad—interpretation ... in finding that instructions on how cast an absentee ballot constitute electioneering. Also, unlike, *McConnell*, the record is devoid of evidence that such a broad definition is necessary to achieve the State's interest in preventing corruption—or, to use *McConnell*'s words, that an express advocacy line would be "functionally meaningless" as applied to electioneering proximate to voting places.

Id. at 665 (citation omitted). Consequently, the court applied the express-advocacy construction:

> The reasoning of *Buckley*, *McConnell*, *Schirmer*,[8] and *Burson* suggests that a prophylactic restriction which extends to issue advocacy—that is, protected speech which does not directly seek to elect or oppose specific candidates—cannot be maintained unless the state demonstrates that the limitation was necessary to prevent intimidation and election fraud. Because Kentucky has failed to demonstrate that interest here, we apply a narrowing construction to the term "electioneering," and find that it may permissibly apply only to speech which expressly advocates the election or defeat of a clearly identified candidate or ballot measure.

Id. at 665.

Second, the Fifth Circuit cited *Anderson* and followed its analysis in *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 663-66 (5th Cir. 2006). At issue in *Carmouche* was a First Amendment challenge to the term "expenditure" in Louisiana's Campaign Finance Disclosure Act ("CFDA"), which was challenged as unconstitutionally vague and overbroad. *Id.* at 658, 663. "Expenditure" was defined to reach "anything of value made for the purpose of influencing the nomination or election of a person to public office. *Id.* at 663. The government claimed that *Buckley* upheld a for-the-purpose-of-influencing definition of expenditure, so it was not unconstitutional. The Fifth Circuit held: "We agree, but only by imposing the same limit-

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[8] In *Louisiana v. Schirmer*, 646 So. 2d 890, 901 (La. 1994), "the Louisiana Supreme Court ... appl[ied] something like an issue advocacy/express advocacy distinction." *Anderson*, 356 F.3d at 664.

ing construction on the CFDA that the Court employed in *Buckley*." *Id.* The court cited *Anderson*'s holding that "*McConnell* does not obviate the applicability of *Buckley*'s line-drawing exercise where, as in this case, we are confronted with a vague statute." *Id.* at 665 (citation omitted). It said that "[*McConnell*] has stated that *legislatures* may employ standards other than a bright-line distinction between express and issue advocacy as long as they are precise ...." *Id.* (emphasis in original). And so, the court decided to apply the express-advocacy test to cure the vague for-the-purpose-of-influencing definition of "expenditure":

> The flaw in the CFDA is that it *might* be read to cover issue advocacy. Following *McConnell*, that uncertainty presents a problem not because regulating such communications is *per se* unconstitutional, but because it renders the scope of the statute uncertain. To cure that vagueness, and receiving no instruction from *McConnell* to do otherwise, we apply *Buckley*'s limiting principle to the CFDA and conclude that the statute reaches only communications that expressly advocate the election or defeat of a clearly identified candidate. In limiting the scope of the CFDA to express advocacy, we adopt *Buckley*'s definition of what qualifies as such advocacy.

Id. The court then explained that *Buckley*'s express-words-of-advocacy definition controls for such purposes—despite *McConnell*'s context-specific statements about the tests inadequacies—because "*Buckley* remains good law in such circumstances" since *McConnell* was silent "about the continuing relevance of the magic words requirement as a tool of statutory con-

struction where a court is dealing with a vague campaign finance regulation." *Id.* at 665 n.7.

Third, the Ninth Circuit cited *Anderson* in agreeing that *McConnell* "left intact" the express-advocacy construction to curing vagueness and overbreadth:

> [A]s stated recently by the Sixth Circuit, *McConnell* "left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest.

American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979, 985 (9th Cir. 2004) (citation omitted). But, the Ninth Circuit noted, "[f]ederal courts are 'without power to adopt a construction of a state statute unless such a construction is reasonable and readily apparent.'" *Id.* at 986 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000)). And it decided that the statute was not amenable to a saving strict-scrutiny construction. *Id.* The statute required "certain groups or entities publishing 'any material or information relating to an election, candidate or any question on a ballot" to reveal *on the publication* the names and addresses of the publication's financial sponsors." *Id.* at 981 (emphasis in original). The court noted that the statute had no "advocacy" language because it "applie[d] to 'information,' not a term that suggests any kind of exhortation to action." *Id.* at 986. And the statute "applie[d] to 'material or information *relating to* an election, candidate or any question on the ballot," so that it "reache[d] objective publications that concern any aspect" of the

foregoing, including "discussions of election procedures, analyses of polling results, and nonpartisan get-out-the-vote drives ...." *Id.* "Further, other provisions ... make clear that the Legislature explicitly uses language to indicate a limitation to advocacy speech when it intends such limitation," the court continued, and it concluded it could neither impose a saving express-advocacy construction or certify a construction question to the state supreme court. *Id. Heller* subsequently held the provision unconstitutional under *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

In sum, three circuit courts have recognized that post-*McConnell* the express-advocacy construction may be imposed on imprecise and overbroad election-related provisions to save them from unconstitutionality—but only where construction of a state statute is reasonable and readily apparent. As discussed in Part V, these cases provide valuable guidance in the present case.

V.

The Foregoing Doctrines Prove the Provision, Policy, and Proffered Construction Unconstitutional.

The foregoing doctrines govern the First Amendment analysis of (A) the challenged provision; (B) the Policy interpreting "political"; and (C) the limiting construction proffered in Respondents' Joint Brief in Opposition ("Opp'n").

A. The Challenged Provision Is Unconstitutional and Not Amendable to a Saving Construction.

The challenged provision is the third sentence of Minnesota Statute Section 211B.11(1), which provides: "A political badge, political button, or other political insignia may not be worn at or about the polling place

on primary or election day." The term "political" is imprecise and overbroad and not readily susceptible to a saving construction.

As noted above, *supra* Part I.A, *Buckley* began construing a purpose-of-influencing phrase (in a catch-all disclosure provision) by noting a Senate Report that said the was goal was "'total disclosure' by reaching 'every kind of *political* activity.'" 424 U.S. at 76 (citations omitted) (emphasis added). But since "political activity" was obviously overbroad, *Buckley* first narrowed the goal by saying that Congress really sought to regulate just "political *campaign* financing" and "*campaign*-oriented spending." *Id.* at 77 (emphasis added). But that didn't solve the imprecision and overbreadth problem because the Court then had to impose the express-advocacy test to prevent imprecision and overbreadth as to individuals. Because *Buckley* rejected "political" in favor of "campaign-oriented" when construing the goal of a federal statute, and then further required the narrowing express-advocacy construction to save it from imprecision and overbreadth—and because "political" is not "campaign" and express-advocacy is not required—the challenged provision is unconstitutionally imprecise and overbroad. (And as discussed in Part V.C, the proffered saving construction—premised on the tacit acknowledgment that the term "political" standing alone is unconstitutional—also fails.)

The challenged provision is not amenable to a saving construction. As the Ninth Circuit noted in *Heller*, 378 F.3d at 985, "[f]ederal courts are 'without power to adopt a construction of a state statute unless such a construction is reasonable and readily apparent.'" *Id.* at 986 (quoting *Stenberg*, 530 U.S. at 944). No con-

struction is reasonable and readily apparent here, as Petitioners assert. (Petrs.' Br. 16.) This is so for at least two reasons.

First, as *Heller* noted, if the Legislature shows it can plainly address a topic in one provision, but does not in another, the second can't be read to mean what the first means. 378 F.3d at 986 (dealing with other provisions addressing advocacy). Here "political" can't be construed as limited to "campaign-related" because, as Petitioners note, "[t]he first sentence of Section 211B.11(1) forbids active campaigning at polling places" by banning "'campaign material ... or in any manner try[ing] to induce or persuade a voter ....'" (Petrs.' Br. 4.) The first sentence of § 211B.11(1) showed that the legislature knows how to use "campaign" and to use advocacy language. So "political" can't reach only "campaign-related" activity, have advocacy language imported, and be saved by an express-advocacy construction.

Second, as *Heller* also noted, where a state-law provision addresses no "advocacy," imposing an express-advocacy construction on it is not proper. 378 F.3d at 986. In the third sentence of § 211B.11(1), unlike the first sentence, there are no words of advocacy, so by its terms it doesn't regulate advocacy. And while the ability of federal courts to construe federal laws is much greater than their ability to impose (nonbinding) constructions on state statutes, *Buckley* and *MCFL* at least had relative-to, for-the-purpose-of-influencing, and in-connection-with language as a starting point for an express-advocacy saving construction. No such language occurs in the challenged provision.

So the challenged provision is both unconstitutionally imprecise and overbroad and not amenable to a

saving, express-advocacy construction. It should be held unconstitutional under the First Amendment.

B. The Interpretive Policy Is Unconstitutional.

An Election Day Policy ("Policy") interprets § 211B. 11(1) to reach "'political badges ... or other political insignia *or* displaying campaign materials at the polling place,'" with what is "political" determined by election judges.[9] (Petrs.' Br. 7 (citation omitted) (emphasis added by Petrs.' Br.).) The Policy provides the following non-limiting examples of "political":

- Any item including the name of a political party ....
- Any item including the name of a candidate at any election.
- Any item in support of or opposition to a ballot question at any election.
- [Any] [i]ssue oriented material designed to influence or impact voting ....
- [Any] [m]aterial promoting a group with recognizable political views ....

(Petrs.' Br. 8 (citation omitted).) But "political" remains imprecise and overbroad for at least five reasons.

First, "political" materials are clearly distinguished from "campaign" materials, so the former cannot be construed to be limited to the latter.

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[9] Granting election judges discretion to determine what is "political" is especially troubling as being an election judge requires no expertise in First Amendment or statutory construction doctrines. So such discretion should only be entrusted where there is an extremely bright-line test, such as *Buckley*'s express-words-of-advocacy test, but "political" is not amenable to that construction.

Second, mere description of certain political materials does not resolve the First Amendment imprecision and overbreadth of "political."

Third, the phrase "support of or opposition to" introduces advocacy language, but it falls short of the required precision of the express-advocacy test. It is imprecise and overbroad for the same reason that *Buckley* rejected the formulation "'advocating the election or defeat of' a candidate," because it lacked the required precision of the express-words-of-advocacy test. 421 U.S. at 42-44. And such advocacy language is absent from the third sentence of § 211B.11(1), so the authority (if any) for this advocacy language must derive from the non-challenged first sentence, not the third.

Fourth, "[i]ssue oriented material designed to influence or impact voting" both introduces issue advocacy that *Buckley* and *MCFL* protected and relies on two tests that have been expressly rejected as unconstitutional. One test is brought in by the word "designed," which introduces an intent-and-effect test that has been expressly rejected at least twice by this Court. *See supra* Part I.B. The other test, brought in by the phrase "designed to influence," introduces a for-the-purpose-of-influencing test, which is precisely what *Buckley* held to be vague and overbroad absent the express-advocacy test, 421 U.S. at 44, to which the challenged provision here is not amenable. *See supra* Part V.A. And the phrase "or impact" introduces a term that is plainly vague and overbroad because "designed to ... impact" is less precise than the already rejected for-the-purpose-of-influencing test. Moreover, "impact" could never be cabined, given the ability of most anything to "impact" elections. So though the foregoing

introduces advocacy terms (absent from the challenged third sentence), none is constitutional.

Fifth, "[any] [m]aterial promoting a group with recognizable political views" introduces an advocacy term, "promoting," that is absent from the challenged third sentence, but it is more vague and overbroad than the already rejected for-the-purpose-of-influencing test.[10] And the notion of promoting "group[s] with recognizable political views"—including the imprecision of both "recognizable (which is akin to a forbidden effect test, depending on audience perception) and "political"—is so imprecise and overbroad that it would be impossible to cabin, reaching far beyond regulatory norms in the highly protected First Amendment realm. It could sweep in even clothing brand names and logos where manufacturers have taken "political" positions, which happens routinely and widely in today's political climate. For example might a potential voter be rejected by some election judge for wearing Converse All Star sneakers to the poll because Converse affirms its values of "diversity," "sustainability," and being "global citizens"? *See Converse Values*, https://jobs.converse.com/about (providing video link). Surely those could be perceived by some election judge as recognizable politi-

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[10] *McConnell* held that a requirement that federal political parties use "federal funds" for communications that "promote," "attack," "support," or "oppose" a clearly identified federal candidate was not vague, but that was justified in large part because "actions taken by political parties are presumed to be in connection with election campaigns." 540 U.S. at 170 n.64. No such presumption or sophisticated political actor is at issue here to justify "promotes."

cal values of a group, making such sneaker wearers excludable from polls and buffer-zones.

In sum, the Policy purporting to interpret "political" actually exacerbates the unconstitutionality of "political," rather than saving the challenged provision from unconstitutional imprecision and overbreadth. And it shows that the challenged provision is not amenable to a saving construction because the Policy's descriptions of what "political" means are themselves unconstitutionally imprecise and overbroad.

C. The Proffered Construction Is Unconstitutional.

In tacit recognition of the unconstitutionality of the term "political" standing alone (or as described in the Policy), Respondents offered a construction in an attempt to save "political":

> The prohibition on wearing "political" paraphernalia ... has a common-sense understanding. *See* Minn. Stat. § 211B.01, subd. 6 (2016) ("An act is done for 'political purposes' when the act is intended or done to influence, directly or indirectly, voting at a primary or other election."

(Opp'n 27.)

Of course, the cited provision, § 211B.01 ("Definitions"), provides applicable definitions, including of "campaign material"[11] and "political purposes." But the

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[11] To the extent "campaign material" is used in an attempt to define "political," the former is also unconstitutionally imprecise and overbroad because it includes "any ... material that is disseminated for the purpose of influencing voting," Minn. Stat. § 211B.01, subd. 2, and purpose-of-influencing test have been held unconstitutionally imprecise

word "political" is used in the challenged third sentence of § 211B.11(1), not the phrase "political purposes" from the definitions. "Political" and "political purpose" are not the same. "Political" itself is undefined. In the challenged provision, "political" modifies things—a "badge," "button," or "insignia," not one's "purpose." A political purpose is grammatically and conceptually distinguishable from a political badge, button, or insignia, which makes the attempted importation of "political purpose" to define "political" improper. For example, a "political badge" is not an "act," as the "political purpose" definition envisions. Badges, buttons, and insignias can't "act" for political purposes or otherwise. Moreover, "political purpose" is defined with a forbidden intent-and-effect test ("done for" and "intended or done to") that is coupled with a purpose-of-influencing test (held unconstitutionally imprecise and overbroad since *Buckley*), both further blurred by a "directly or indirectly" qualifier that introduces further imprecision and overbreadth. So the proffered construction doesn't save the challenged provision from unconstitutional imprecision and overbreadth.

Conclusion

As shown, the challenged provision is unconstitutionally imprecise and overbroad. And it is not amenable to *Buckley*'s approved express-advocacy construction. The Policy and proffered construction exacerbate the imprecision and overbreadth of "political." Consequently, the challenged provision should be held facially unconstitutional under the First Amendment.

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and overbroad since *Buckley*. *See supra* Part I.A.

Respectfully submitted,

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